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Perpetual momentum: directed and unconstrained?

Fritz W. Scharpf

ABSTRACT At the most general level, the perpetual momentum of ‘integration through law’ is driven by the substantive dynamics of legal doctrines extending the protection of individual interests and by procedural conditions facilitating the use of European law to challenge the institutional regimes of EU member states. Given the supremacy and direct effect of European law, and the decision rules of EU policy making, this momentum could not be halted through political or judicial intervention.

KEY WORDS Citizenship; economic liberties; ECJ; European law; individual rights.

INTRODUCTION: THE CONTINGENCY OF THE COURT’S POWER

The European Court of Justice (ECJ) as the ‘Motor of Integration’ promoting a ‘Europe of Rights’ – these have become generally accepted descriptors in affirmative or critical accounts of the role of ‘Integration through Law’ in the constitutional development of the European Union (EU). Contributions in the present collection do challenge the descriptive generality of the underlying assumptions; they help to identify the areas where they do in fact apply; and they reconstruct the mechanisms and the conditions on which their empirical effectiveness depends. In my reflections on this collection I will not review the individual contributions. Instead, I will suggest some observations on the domain, the direction and the impact of the Court’s ‘constitutional-court function’ in the multi-level European polity.

At the outset it needs to be acknowledged that the dominant focus on the ECJ’s active role in widening the domain of legal integration tends to underestimate the importance of its more ordinary ‘high-court functions’ as well as the precariousness of the Court’s powers. The European Union, lacking an administrative infrastructure of its own, has come to rely on private litigants and national courts to ensure the effectiveness of its (constitutionally undisputed) legislative powers (Kelemen 2011). As a consequence, as Damian Chalmers and Mariana Chaves (2012) show, monitoring and guiding the interpretation and application of European legislation through national courts does indeed constitute a major part of the ECJ’s ordinary business. At the same time,

however, Gareth Davies (2012) emphasizes the precarious nature of these supervisory powers. Unlike national high courts, the ECJ is not positioned at the apex of an integrated judicial hierarchy. Even though European law is to be treated as supreme 'law of the land' in all EU member states, litigants cannot appeal from national courts, and the ECJ cannot reverse their judgments. To come into play at all, it depends on preliminary-reference requests; and the effect of its rulings depends on the use that national courts will make of them. In short, therefore, the effectiveness of the Court's role in the enforcement of European law is contingent on the support of national judiciaries, and it may vary across national judicial cultures.

THE LIMITS OF POLITICAL INTERFERENCE

In comparison to national high courts, however, there seem to be very few constraints on the ECJ's capacity to interpret and shape the substance of European law in the cases that come before it. Daniel Kelemen (2012) persuasively argues that none of the political constraints on judicial independence that have been discussed in the American literature could be employed to influence the ECJ. Given the extremely high consensus requirements of EU legislation and Treaty amendments, the possibility of legislative, let alone constitutional, override is as remote as are threats of jurisdiction stripping, resource punishment or court packing that would all require the unanimous agreement of 27 member states. In an ingenious thought experiment Kelemen also shows that, even if they tried, national governments would hardly be able to influence ECJ decisions through the strategic use of individual judicial appointments. Moreover, drawing on Eurobarometer data which suggest that popular 'trust' is comparatively high for the ECJ and much lower for national governments, parliaments and political parties,¹ Kelemen also suggests that public opinion would not support governments confronting or openly disobeying ECJ decisions. Given the normative commitment to a 'rule of law' and the mystique of courts 'saying what the law is', I would agree.

However, the fact that the ECJ is institutionally well protected against political interference merely implies a comparatively high potential for judicial law-making. That it is in fact used, and employed with strong pro-integration effect, is shown by Michael Malecki (2012). Based on a dataset including all 1,549 preliminary-reference decisions between 1970 and 1997 in which the Commission did announce a position, he finds that the Court sided with the Commission in about 75 per cent of the cases – which he interprets as a strong pro-integration tendency. And while significant differences among individual judges are revealed through sophisticated statistical analysis, even the least pro-European judge has supported the Commission in 72 per cent of the cases in which he or she participated. That seems strong evidence in search of strong explanations. In this context, reference is often made to hypotheses about the – neo-liberal and/or pro-European – preferences and interests of individual judges (e.g., Chalmers 1997; Höpner 2010) or to their inclusion in the Euro-law epistemic

community (Alter 2009; Vauchez 2007). The present collection bypasses such attempts to assess individual subjectivities in favour of structural, institutional and contextual explanations.

A MODEL OF JUDICIAL ACTIVISM

Susanne Schmidt's (2012) contribution, in particular, represents an ambitious attempt to explain both, the ECJ's judicial activism and its pro-integration tendency, in a two-stage model of dynamic and directed path dependence. The first stage of this model amounts to a reconstruction of the logic of legal reasoning in a case-law system. There, the principles of *stare decisis* and of precedent serve to ensure the inter-temporal stability of judge-made law by requiring that, in the absence of massive countervailing considerations, the legal rule announced in one case also ought to be applied in factually similar later cases. At the same time, however, judges are also expected to guard the consistency of the case-law system across lines of cases. This implies that innovative decisions ought to be guided by a Kantian 'categorical imperative' favouring rules that could be generalized. And in order to minimize *ad hoc* decisions, cases that are not directly covered by precedent should still be decided by reference to previously established rules which may serve as a 'heuristic principle' in the search for appropriate solutions – and will thus contribute to the ideal of an internally consistent legal order that is being discovered, rather than made, by judges (Esser 1964: ch. X). In a case-law system, therefore, the set of rules announced in previous decisions will be associated with a penumbra of potential extrapolations which might be invoked in different, but arguably analogous, case constellations in other fields.

The second stage of Schmidt's (2012) model focuses on individuals, firms and other organizations for which not only the settled case law, but also its penumbra of potential extensions, represents an opportunity structure. If they find it worthwhile to advance their interests by invoking European law in ordinary litigation, and if the interpretation of the European rule is not yet definitely settled by precedents, the national court may refer the question² to the ECJ for a preliminary ruling. By implication, therefore, the flow of legal issues that are presented to the Court through the preliminary-reference procedure must be shaped by a double selectivity: the requests will be driven by litigants seeking an advancement of their individual interests beyond the limits established by existing national law – rather than by litigants whose interests are protected by national law; and the Court will only see requests that seek an extension of European law beyond the limits defined by previous ECJ precedents. That does of course not imply that all of these requests will be granted. But given the supremacy of European law over all national law, and given the supremacy of Treaty law over European legislation, any decision in which such a request is in fact successful will extend the reach of European law with a 'ratcheting effect' that is protected against political reversal, and that could be judicially reversed only if the Court would explicitly overrule its own precedent. In the abstract,

therefore, Susanne Schmidt's two-stage model does predict a tendency of the ECJ case law to dynamically extend the protection of individual interests through European law – and thus to promote 'Integration through Law' as well as a 'Europe of Rights'.

More specifically, Schmidt (2012) uses this model to explain a path-dependent evolution of ECJ case law originating from the highly innovative *Cassis* decision. There, the Court had applied the Treaty commitments to the free movement of goods not only to measures discriminating against imports but to all national rules which, if they differed from one country to another, were seen as 'non-tariff barriers' that might impede the exercise of free-movement rights. If such rules could not be justified by reference to a limited number of Court-defined 'mandatory requirements' combined with a strict proportionality test, the new rule would be 'mutual recognition' – whereby free access had to be granted to all products lawfully introduced in their country of origin. Schmidt further describes how the combined principles of non-discrimination (on grounds of nationality) and of non-restriction (of free movement) have subsequently been extended to the other economic liberties (services, capital, workers and establishment) in spite of significant differences in the underlying *problematique*.

Thus, the Court, emphasizing 'non-restriction', applied the *country-of-origin rule* not only to regulations of product quality, but also to services and capital – where the expectation that host countries could rely on the home-country regulation and supervision of mobile capital and financial services was never plausible. By contrast, 'non-discrimination' is emphasized to ensure the strict application of *host-country rules* where the free movement of workers and the freedom of establishment are at stake. And as the Court continued to extend free movement rights from workers to their family members, to job-seekers, to students and, finally, to all citizens of EU member states, it also went beyond the logic of market integration. In effect, the Court is promoting social integration by rapidly increasing the access of economically inactive migrants to the full range of benefits that national welfare states have come to provide and finance for their own citizens.

LITIGANTS, ECONOMIC RIGHTS, AND THE LIMITS OF SOLIDARITY

These extensions of free-mobility rights are well explained by Schmidt's two-stage model – but obviously their dynamic evolution and its directions are driven by very different groups of litigants (including, of course, the Commission when it is intervening against member state regulations through infringement prosecutions). The contribution of Damian Chalmers and Mariana Chaves (2012) provides an extremely interesting and useful cross-tabulation representing the involvement of five classes of litigants involved in preliminary-reference decisions dealing with 20 different sub-fields of European law.

At the same time, however, the dynamic extension of the non-restriction and non-discrimination principles through the free-movement decisions of the ECJ raises fundamental issues concerning the EU's constitutional architecture that are difficult to resolve within the Court's established framework of legal reasoning. The first of these issues is highlighted by the fact that, in Chalmers and Chaves's (2012) cross-tabulation, 'domestic firms' constitute a large segment of the litigants in the free-movement fields (and in taxation) – which the authors find puzzling since 'competition, free movement of services and freedom of establishment all require, in principle, the presence or imminence of transnational trade for their instigation'. Under the Court's definition of free-movement rights, however, such constraints do not play a role.

Since, according to the formula announced in *Dassonville* and re-affirmed in *Cassis*, the exercise of free-movement rights is protected against all national measures '*which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade*' (8/74 at #5; emphasis added) (and since the ECJ has no restrictive rules on 'standing to raise the issue'), the identification of 'indirect' or 'potential' restrictions does indeed not depend on litigants that are themselves involved in any border-crossing transactions. But if neither protectionist discrimination nor a manifest impact on transnational economic interactions is required, the prohibition of all measures that may be '*liable to hinder or make less attractive the exercise of the fundamental freedoms*' (*Gebhard* C-55/94; emphasis added) will logically turn into judicial control of all national rules and practices that regulate or burden domestic economic activities as such (because these, by logical implication, might also reduce the attractiveness of inward mobility).

As a consequence, free-movement rights provide the Court with general powers to require the deregulation and liberalization of national economic regimes – and thereby to displace the political choices of EU member states through a judicially defined 'economic constitution'.³ With regard to the free movement of goods, where national standards on product quality have largely been replaced by European legislation on consumer and environmental protection, that may appear as a minor problem. But that is not true of the case law regarding free capital movement and establishment, where highly salient differences among national 'varieties of capitalism' have impeded political re-regulation at the European level. It is the case law, therefore, rather than legislation, that has greatly reduced the capacity of member states to shape and defend specific national regimes of corporate governance (Höpner and Schäfer 2010), to tax the profits of domestically producing corporations or to promote economic development through 'services of general economic interest'. In other words, European 'social market economies' are being transformed into liberal market economies (Scharpf 2010) primarily by the Court's extension of the 'non-restriction' principle.

By contrast, market-liberalizing effects are less important or even lacking in the case law extending the free-movement rights of workers, job-seekers, students, patients and, finally, citizens. To be sure, the free movement of

workers was intended to complement economic integration by creating a European labour market⁴ and the case law extending patient rights (Sindbjerg Martinsen and Vrangbaek 2008) might also contribute to creating a European market for health care services. But such effects would matter less and less as mobility rights are conferred on students⁵ and other economically inactive migrants and, finally, on citizens in general (Wollenschläger 2011). In any case, however, the effect of these decisions is not negative integration and deregulation in the name of market freedoms. Instead, they are meant to establish positive claims of migrants (or migrant consumers) to the social benefits and services of existing national welfare states,

In that sense, decisions extending the equal-treatment rights of mobile persons may indeed be interpreted as extending the reach of market-correcting solidarity (Caporaso and Tarrow 2009). At the same time, however, the logic of non-discrimination on grounds of nationality does not reflect the 'club-goods' character of collectively financed welfare regimes which member states have created for their own citizens and permanent residents. By extending their coverage to non-members, the case law may engender fears of 'welfare migration' in states with high levels of redistribution – which may then provoke either xenophobic political reactions or undermine the commitment to, and the generosity of, solidaristic welfare systems (Menéndez 2009; Somek 2008a). Beyond that, however, the Court's reference to both of the *Cassis* principles (non-restriction as well as non-discrimination) in its citizenship decisions implies the possibility that these may also be applied – just as is true in the case law on economic liberties – in cases that do not involve transnational mobility at all. If that should come to pass, any national regulation that restricts individual freedom domestically may also be challenged as a restriction to the exercise of European citizenship rights – which would radically liberalize not only the economic regimes but also the social orders of all EU member states (Wollenschläger 2011).⁶ That is not meant to suggest that the Court will soon go to extremes in challenging the normative foundations of national societies. Yet, what stands in the way of litigant pressures are at best the discretionary obstacles of the proportionality test.

LITIGANTS AND ANTI-DISCRIMINATION

The contribution of Alec Stone Sweet and Kathleen Stranz (2012) introduces a third category of expansionary case law that differs from both the economic and the non-economic free-movement cases discussed by Susanne Schmidt (2012). These decisions are definitely not about negative integration – in fact, they are not about European integration at all. They also serve no deregulatory or liberalizing purpose. Instead, the German statute that was seen to violate the ECJ's newly-found 'fundamental right' against age discrimination in the *Mangold* case had in fact liberalized existing employment protection legislation in order to improve the employability of older workers. At the same time, these cases are not, or at least not primarily, about widening the access to welfare state benefits. Instead, non-discrimination is invoked to achieve inter-personal

equality *per se*, regardless of whether unequal treatment is imposed by the state or by non-state actors.

It is clear that these cases cannot be explained as a path-dependent unfolding of the principles adopted in *Cassis*. While they should also be seen as the product of a litigation-driven evolution from principles announced in early precedents, their starting position was not defined by the free-movement clauses of the European Economic Community Treaty, but by the requirement of equal pay for men and women (Art. 119 EEC). Again, however, the case law quickly extended the principle to non-pay-related aspects of employment and to non-employment-related aspects of gender equality. In the process, moreover, the definition was enlarged to include ‘indirect discrimination’ and the principle was also applied with ‘horizontal direct effect’ to contractual relations between employers and employees (Cichowski 2007). In this regard, a high point was reached in the recent ‘*Unisex*’ decision (C-236/09) where the ECJ invalidated a Council Directive that had allowed insurance contracts to reflect statistical differences in the life expectancy (or the accident proneness) of men and women.

As Stone Sweet and Stranz (2012) are pointing out, whenever the Court is applying Treaty-based rights with horizontal direct effect, it is in fact engaging in ‘positive integration’ by imposing a common European rule on private contractual relationships. In the *Unisex* case, it is in fact installing common European rules requiring solidaristic redistribution – where men must subsidize the life insurance of women while cautious women drivers will subsidize the accident insurance of reckless males. In functional terms, this appears as an extreme case of judicial legislation, far removed from a textual base in the Treaty and overriding even the explicit political choice of a Council Directive. Normatively, however, these cases on interpersonal non-discrimination cannot be supported by the usual legitimating discourses hailing the Court as a ‘Motor of Integration’. At best, they may represent a contribution to the ideal of a ‘Europe of rights’ (Kelemen 2011).

It is this ideal which could in fact be employed on the one hand as a normative justification and on the other hand as a functional explanation in a model that tries to account for active judicial law-making on economic as well as non-economic mobility rights, and also on fundamental rights that involve neither economic liberties nor transnational mobility. What these seemingly disparate fields of ECJ case law have in common is the fact that the Court’s law-making power does depend on the creation of individual rights. The foundation of this power was laid already in 1963, in the *Van Gend en Loos* (26/62) decision where the Court introduced the doctrine of ‘direct effect’ by interpreting a Treaty rule on tariffs as ‘*creating individual rights which national courts must protect*’ (emphasis added). In the constitutional structure of multilevel Europe, this was the crucial linchpin. In the absence of Treaty-based individual rights with direct effectiveness and supremacy, the preliminary-reference procedure could never have achieved its litigation-driven dynamism. The ‘Motor of Integration’ could only have worked through Treaty amendments and Council directives; and

member state governments would have remained ‘Masters of the Treaty’, rather than finding themselves pushed forward and at the same time constrained by the judicial power to promote ‘Integration through Law’ and a ‘Europe of Rights’.

CONCLUSION: THE ECJ AND THE SKEWED CONSTITUTIONAL BALANCE

While the Court’s contribution to European integration is widely considered beneficial in politically correct discourses, its impact on the constitutional balance of the multilevel European polity does raise serious problems. At the most fundamental level, all constitutional democracies must try to balance ‘republican’ principles emphasizing political self-determination and ‘liberal’ principles providing constitutional and judicial protection for certain individual rights. If this balance is upset by the ‘perpetual momentum’ of ECJ case law that is consistently extending the domain of constitutionally protected individual rights – and hence the range of issues that are placed beyond the reach of democratic self-determination – the legitimacy of the multilevel European polity itself may be undermined (Scharpf 2009). The question is whether there are, or could be, countervailing mechanisms that would defend or restore the constitutional balance.

Political remedies are unlikely to succeed. For reasons demonstrated in Kelemen’s (2012) contribution, member states will be unable to oppose the Court directly, and even though governments may be able to gain some relief through the practices of ‘creative’ evasion and passive resistance described by Michael Blauberger (2012), these will remain vulnerable to litigation by ‘private prosecutors’ and the judgments of national courts which governments could not ignore without disavowing their allegiance to the rule of law (Kelemen 2011). Possibly, however, the very fact that national courts must play a crucial role in the European legal system might also allow them to shield national polities and their constitutional balance against the unbalancing impact of ECJ decisions.

That the potential for such a protective role does exist is shown in Gareth Davies’s (2012) contribution. In preliminary-reference decisions, the Court is responding to questions of law, rather than deciding cases. And its responses typically include ‘open norms’ (including the criteria of the proportionality test) whose application to the facts of the case leaves a good deal of room for the judgment of the referring court. Moreover, it is the national court that must decide whether to ask for a preliminary reference in the first place, and it will also phrase the questions to which the ECJ may respond. In fact, comparative research has found significant differences in the frequency of preliminary references originating from courts in different member states, and it has shown that, in particular, courts in Scandinavian countries seem to be more reluctant to challenge the legislation of democratically legitimated national parliaments than is true of judges in post-fascist states on the European continent (Wind *et al.* 2009). However, Michael Blauberger (2012) reports that the

Danish legislature responded to the *Laval* decision even though Denmark was not a party to this case and, more generally, that law-abiding governments tend to take account of rules announced in ECJ precedents regardless of their immediate involvement.⁷

In any case, however, the reluctance of Scandinavian judges to challenge their own parliaments is not generally shared by national courts – which often seem eager to participate in the powers of judicial review which otherwise would be reserved to national constitutional or high courts (Alter 2001; Stone Sweet 2004). This is dramatically illustrated by Stone Sweet and Stranz (2012) in their fascinating account of how the ECJ's *Mangold* decision (C-144/04) represents a famous victory of German labour courts defending their aggressive case law on non-discrimination not only against liberalizing legislation but also against the constitutional court's more restrained reading of 'general equality'. There is, however, a further and more fundamental implication of this particular story.

In its decision on the *Lisbon* Treaty, the *Bundesverfassungsgericht*⁸ had set itself up as the ultimate protector of national 'constitutional identity', including its foundation in the principle of democratic self-determination. Moreover, it had asserted its competence, and announced its intention, to protect these principles not only against European legislation exceeding the powers conferred by the member states, but also against creeping extensions through overly extensive interpretations of delegated powers (at # 242). Since in Germany the ECJ's *Mangold* decision had been prominently denounced as a clear case of *ultra-vires* interpretation (Herzog and Gerken 2008),⁹ whereas the constitutional court's *Lisbon* judgment was no less violently criticized as a reversion to constitutional nationalism, the first occasion where the *Bundesverfassungsgericht* would have to deal with the *Mangold* rule raised expectations of high drama (Gerken *et al.* 2009).

As one ought to have expected, however, when the occasion arose just a year later in the *Honeywell* decision,¹⁰ the constitutional court found nothing wrong with *Mangold*: realizing that the uniform application of European law would be impossible if all national courts would generally apply their own constitutional standards (at # 57), the court refrained from attempting its own interpretation of European rights. Even if the ECJ's decision might not have been reached through accepted methods of legal interpretation (at # 68), it would have to be accepted unless it would change the structure of competences in major ways or impose significant burdens on (national) basic rights (at # 66). This the ECJ's *Mangold* decision had not done in 'obvious and structure-changing' ways. Under this standard, the dissenting opinion pointed out, the *Bundesverfassungsgericht* will never be able to intervene against the 'creeping' erosion of national autonomy through judicial interpretation. And given the direct effect and supremacy of ECJ case law, its impact will not be constrained by explicit allocations of competences¹¹ or by subsidiarity clauses in the Treaties.¹²

The ultimate reason for this defeat is constituted by the shared commitment of both courts to the protection of individual rights. As the ECJ's dynamic

extension of European law proceeds not through decisions widening European legislative competences but through the expansion of *individual rights*, the *Bundesverfassungsgericht* could only oppose it on individual-rights grounds as well. Thus, when it had first challenged the supremacy of European law in order to protect the ‘identity’ of the German constitution in its 1974 *Solange I*¹³ decision, it had focused on the Basic Law’s catalogue of basic rights which it would have to guard ‘as long as’ European law did not provide similar guarantees. By 1986, however, in *Solange II*,¹⁴ the German court had to acknowledge that the ECJ had in the meantime¹⁵ developed its own fundamental rights jurisprudence by reference to the common constitutional tradition of EU member states – and so it announced that it would now refrain from exercising its own basic-rights review ‘as long as’ effective European review was ensured.

In other words, the court has accepted, and actually invited, the ECJ’s power to define European individual rights – and in its own role as the champion of basic rights, it may at best compete with the ECJ for more protection, but it cannot intervene to defeat individual rights in the interest of political power (or democratic self-determination). In fact, the only potentially relevant objection to *Mangold* the court raised (and quickly dismissed) in *Honeywell* was that the European rule against age discrimination might violate employers’ freedom of contract under the German constitution. Hence, competition between European and national individual rights might still play a role in the dialogue between the ECJ and national constitutional courts. But national courts cannot be expected to constrain the impact of a case law that dynamically extends the domain of protected individualism at the expense of political capacities for collective self-determination (Somek 2008b).¹⁶ In effect, therefore, the ‘perpetual momentum’ is likely to go on.

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NOTES

- 1 The comparative interpretation of these differences is not obvious, however. In a democracy, political parties, parliaments and governments are supposed to be involved in competition, public contestation and controversy – which implies that their legitimacy cannot be primarily based on ‘trust’. By contrast, the legitimacy of institutions that are not democratically accountable depends entirely on trust in their integrity and competence – and it would quickly erode if they became embattled in serious controversies.
- 2 Since the ECJ is only responding to questions of law defined by the national court, it will not consider procedural criteria of ‘standing’, ‘ripeness’ and other requirements of a genuine ‘case and controversy’ – which the US Supreme Court employs to

- avoid decisions on insufficiently clarified constitutional issues (Bickel 1962; Scharpf 1966).
- 3 The parallel to the pre-1937 US Supreme Court's use of the 'economic due process' doctrine to prevent all economic regulation (cf. Ehmke 1961; McCloskey 1962; Scharpf 1966) has been noted and criticized by Miguel P. Maduro (1998).
 - 4 The free movement of workers is meant to ensure equality between migrant and domestic workers, whereas the free movement of services protects the right of employers to use 'posted workers' under conditions that are inferior to those enjoyed by domestic workers.
 - 5 Interestingly, when patients are seeking healthcare abroad (invoking the freedom of receiving services), it is their home state that is held responsible for the reimbursement of costs, whereas the host state has to bear the cost when students are seeking education abroad (invoking the prohibition of discrimination on grounds of nationality).
 - 6 It should be noted that in the transition from an authoritarian past in Germany, the constitutional court's interpretation of basic rights has played a very significant liberalizing role. The question is, however, whether the judicial transformation of national societies can be legitimately performed by the European rather than the national high court.
 - 7 If an ECJ precedent seems to undermine the legality of a particular national law, the government's law-abidingness is likely to be challenged by the opposition (and possibly by a coalition party) – with effects on public opinion that are pointed out in Kelemen's (2012) contribution.
 - 8 BVerfG, 2 BvR 2/08, 30.06.2009.
 - 9 The senior author, Roman Herzog, was not only a former president of the *Bundesverfassungsgericht* but had also been president of the Convention that had drafted the EU's Charter of Fundamental Rights.
 - 10 BVerfG, 2BvR 2661/06, 06.07.2010.
 - 11 The ECJ's standard response is that, yes, the regulation of healthcare, etc., is left to member states, but in exercising their powers these must of course respect the Treaty-based rights of individuals. See, for example, *Kohll* (C-158/96 at # 16, 19-20).
 - 12 However, the ECJ's individual-rights adjudication has the power to shape the course of European legislation (Scharpf 2011; Schmidt 2011).
 - 13 BVerfGE 37, 271.
 - 14 BVerfGE 73, 339.
 - 15 The development occurred arguably in response to this and similar assertions of national constitutional courts (Weiler and Lockhart 1995).
 - 16 In German constitutional adjudication, the court is of course aware of, and pays attention to, the requirements of democratic governance when it defines the limits of individual-rights protection in the specific case. But since it never saw a need to explicate these implicit limits in terms of a 'political question doctrine' (Scharpf 1966), they are of no use in conflicts with the ECJ. In legal as in other battles, one cannot beat something with nothing.

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